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[*Ray v. Tennessee Valley Authority*](#), 88-ERA-14 (ALJ Oct. 4, 1988)

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U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

CASE NO: 88-ERA-00014

DATE: October 4, 1988

IN THE MATTER OF

MORGAN G. RAY, SR.
Plaintiff

v.

TENNESSEE VALLEY AUTHORITY
Respondent

Joseph Battle, Esq.
For the Plaintiff

Brent R. Marquand, Esq.
D. Mark Hastings, Esq.
For the Respondent

BEFORE: Richard E. Huddleston
Administrative Law Judge

RECOMMENDED DECISION

This is a proceeding under the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. § 5851 (1982), and its implementing regulations, 29 CFR Part 24. The ERA in § 5851 (a), prohibits a Nuclear Regulatory Commission ("NRC") licensee from discharging or otherwise discriminating against an employee who has engaged in protected activities as set forth in the Act.

STATEMENT OF THE CASE

Morgan G. Ray, Sr., the Plaintiff ("Ray"), at all times relevant to this case was employed by the Tennessee Valley Authority, ("TVA") an NRC licensee, as a nuclear engineer, at the Browns

[Page 2]

Ferry Nuclear Plant. Robert Christie and Morgan Ray jointly filed a complaint dated January 6, 1988, received on January 11, 1988, (ALJ 1)¹ with the United States Department of Labor, Employment Standards Administration as follows:

As a result of events which occurred over the last 15-18 months, members of the Systems engineering Branch of the Tennessee Valley Authority notified Mr. James G. Keppler of the Nuclear Regulatory Commission of our belief that TVA has intentionally provided misleading information to the Nuclear Regulatory Commission regarding the Browns Ferry Probabilistic Risk Assessment. Because of this action and other related concerns which we have lodged internally to TVA, we now believe we (as members of the Systems Engineering Branch) have been subject to adverse actions on the part of TVA management. On December 11, 1987 the Office of Nuclear Power took action to dissolve the Systems Engineering Branch. We have informed ONP upper management that we believe their action is contrary to the best interest of TVA and is an attempt to intimidate and harass us. We request your investigation of this matter. (Joint Exhibit ALJ-1).

Relief was denied by Bennie L. Edwards, Area Director, Employment Standards Administration ("ESA"), U. S. Department of Labor, on February 19, 1988 (ALJ-3). A hearing was requested by the Plaintiff, by telegram to the Chief Administrative Law Judge on February 26, 1988. (ALJ-2). This matter was assigned to this Administrative Law Judge on March 4, 1988, for a formal hearing to be conducted along with similar complaints filed by L. Wang Lau (No. 88-ERA-12) and Robert Christie (No. 88-ERA-13) versus TVA (ALJ-4), and were set for hearing on April 7, 1988. By joint

[Page 3]

letter from all three Plaintiffs dated March 22, 1988, a continuance was requested to allow processing of an additional complaint by L. Wang Lau. (ALJ 6). The continuance was granted by Order issued March 29, 1988, and a finding made that all time limits had been waived by the Plaintiffs, for a formal hearing to be conducted (ALJ-10). The complaints of Mr. Christie and Mr. Lau were subsequently resolved with TVA. See orders dated May 23, 1988, (88-F A-12 and 88-ERA- 13).

A formal hearing (in the case of Morgan G. Ray, Sr.) was scheduled and conducted on June 13, 14, 15 and 16, 1988, at Huntsville, Alabama. During the hearing the parties were afforded the opportunity to present evidence and argument. The record was held open by

agreement to allow filing of briefs. A brief was filed by TVA on August 15, 1988. The Plaintiff submitted argument at the hearing and advised that a brief would not be filed.

ISSUES

1. Has the Plaintiff engaged in any activities which are considered "protected activities" under the Energy Reorganization Act.
2. If the Plaintiff has engaged in such protected activities, has he been discriminated against, as a result of such activities, by TVA with respect to his compensation, terms, conditions, or privileges of employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Energy Reorganization Act provides in § 5851(a) that: No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge

[Page 4]

any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding
or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other, action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.

There is no dispute in this case that the Tennessee Valley Authority is a Nuclear Regulatory Commission licensee. Further, it is not disputed that the Plaintiff has been and remains in the employment of the Tennessee Valley Authority as a nuclear engineer. Thus, in order for the Plaintiff to prevail, he must establish that (1) he has engaged in protected activity under the ERA, (2) that he as the subject of adverse employment action, (3) and that there was a causal link between his protected activity and the adverse action of his employer.

[Page 5]

Protected Activity

The Complaint filed by Mr. Ray sets forth only one specific act which is alleged to be protected activity, but makes reference to "events which occurred over the last 15-18 months" and further "because of this action and other related concerns which we have lodged internally to TVA." The specific protected act referred to in the Complaint is a letter written to Mr. James G. Keppler of the Nuclear Regulatory Commission from the Systems Engineering Branch of the Tennessee Valley Authority, of which Mr. Ray was a part, expressing belief that TVA has intentionally provided misleading information to the Nuclear Regulatory Commission regarding the Browns Ferry Probabilistic Risk Assessment.

The letter referred to has been admitted into the record as Plaintiff's Exhibit 19. This exhibit is a letter dated October 21, 1987, from Robert F. Christie, L. Wang Lau, and Larry D. Proctor to James G. Keppler of the Nuclear Regulatory Commission. The letter to Mr. Keppler states in part that,

Over the last seven years, a number of interactions have occurred between TVA and the NRC concerning the Browns Ferry Nuclear Plant (BFN) Probabilistic Risk Assessment. It is our opinion that the TVA Office of Nuclear Power has intentionally provided misleading information about the BFN Probabilistic Risk Assessment to the NRC over the last 15 months. Also, certain upper level managers of the Office of Nuclear Power at TVA have engaged in activity that can be interpreted as effort to harass and intimidate us because of our attempts to remedy this situation within TVA.

Clearly, if the Plaintiff had been a party to this correspondence, such alone would have been sufficient to constitute protected activity under the ERA. However, Morgan Ray is not one of the persons who signed the letter. Dr. Lau testified in

[Page 6]

response to the question "What role, if any, did Morgan Ray play in the six areas that are listed in that letter?" (Tr. page 122 line 7),

Essentially all six areas related to the Browns Ferry PRA document and as I testified earlier, Mr. Ray is an integral part of providing supportive information to that study and he's my leading man at Browns Ferry. (Tr. page 122 line 9).

The Plaintiff testified that he was the only lead engineer at Browns Ferry who dealt with the Probabilistic Risk Assessment (PRA), and that his direct supervisors in dealing with the PRA, Robert Christie and Dr. Lau, were in Knoxville, Tennessee. (Tr. 384, 385). Similarly, Dr. Lau testified that Morgan Ray was his "key man on site" in the PRA. (Tr. 62).

It is undisputed that the PRA is a safety related document. As testified by Dr. Lau, "Probabilistic Risk Assessment has been identified by the Nuclear Regulatory Commission as a document containing significant safety information." (Tr. 62). Mr. Robert M. Bernero, Director, Division of BWR Licensing, Office of Nuclear Reactor Regulation, NRC, in an August 15, 1986, document addressed to Mr. S. A. White, Manager of Nuclear Power, TVA wrote,

Nevertheless, I reminded you that the draft PRA exists, it represents a substantial risk analysis investment by TVA and a competent contractor, it contains potentially significant safety information about the Browns Ferry units, and it cannot be ignored. TVA must endorse it, amend it, or rebut it. (PX 12).

The Complaint also refers to "events which occurred over the last 15-18 months" and "other related concerns which we have lodged internally to TVA."

Mr. G. Ray's name is signed to a document

[Page 7]

dated September 29, 1987, entitled "Reduction of Fiscal Year 1988 Nuclear Budget-Expression of Staff Views" (PX 9). The document contains the actual signature of "Mark A. Linn for M. G. Ray." This expression of staff views indicates disagreement between the Systems Engineering Branch and the Office of Nuclear Power upper managers of TVA over the use of the PRA, and refers to a July 8, 1987, meeting of the Nuclear Safety Review Board at Browns Ferry during which the subject of the use of the PRA was discussed. Ray testified that he had reviewed the draft of this memo and had called Mark Linn in Knoxville and asked him to sign it for him, on his behalf. (Tr. 279).

Similarly, the signature of "Mark A. Linn for M. G. Ray" appears on a November 20, 1987, expression of staff views (PX 10) entitled "Intimidation and Harassment of Systems Engineering Branch (SEB)." This statement expresses the view that the November 16, 1987, proposed reorganization of the Division of Nuclear Engineering which eliminated the Systems Engineering Branch and moved its functions to a new Nuclear Technology Branch "will adversely affect our ability to impact decisions that affect plant safety and availability." Further the statement indicates "We believe this action to be a continuation of an effort to harass and intimidate SEB." Again Ray testified that he asked Mark Linn to sign the memo for him, and that it was shortly thereafter, on December 11, that the branch was reorganized out of existence. (Tr. 380).

Mr. Ray testified that in August 1987 he had a conversation with Mr. Speidel concerning PRA, Mr. Lau and Mr. Christie when he encountered him out on a walk. He stated that Speidel advised him to disassociate himself with the PRA and his supervisor, Bob Christie and Dr. Lau in the best interest of his career. Ray stated that he told Speidel that he would have to think about it; that it happened at the time he was also considering

a draft of a staff view on the use of the PRA, which he subsequently did sign as one of the nine

[Page 8]

managers. He then went back to Mr. Speidel and advised him that he had made his decision to support the continued use of the PRA. Ray then states that Speidel responded that he (Speidel) agreed with 75% of what Wang Lau says, but that he was not going to buck Chattanooga, so to speak. (Tr. 337, 338).

Ray next testified that he received a phone call at home on September 1, 1987, at 5:50 p.m. from Mr. Chapman, Deputy Project Engineer to Speidel. He says that Chapman wanted to get a series of reports that the System Engineering Branch (Dr. Lau's branch) prepared which showed that the reliability of some electrical components were acceptable, that Mr. Fox wanted in Chattanooga. He says he advised Chapman had those documents in Chattanooga. Ray then states that "Then he at that time told me that-I guess we talked about the situation being tense and he pretty much used the same kinds of words, that I should disassociate myself with the PRA and my bosses, again in the best interest of my career." (Tr. 339).

Clearly, the Plaintiff's work on the PRA is safety related, as the PRA is an inherently safety-related document. Clearly, Morgan Ray was identified as being a part of the PRA project, and was in fact, the only lead engineer at the Brown's Ferry Site who was involved with PRA. When this is considered along with the two expressions of staff views in which Ray participated (PX 9 and 10), Ray was considered as the Browns Ferry part of the PRA project. Thus, it is clear that Morgan Ray was an inseparable part of the October 21, 1987, letter to the NRC (PX 19), in which it is alleged in part that, the TVA Office of Nuclear Power has intentionally provided misleading information about the BFN Probabilistic Risk Assessment to the NRC over the last 15 months."

Accordingly, I find that the Plaintiff has engaged in protected activities within the meaning of the ERA, and is entitled to the protection of that statute.

[Page 9]

Retaliation

As the Plaintiff has established that he has engaged in protected activities, it must be next determined whether he has suffered any retaliation from TVA as a result of his activities. As indicated, the only specific retaliatory action alleged in the Complaint is the statement that,

On December 11, 1987, the Office of Nuclear Power took action to dissolve the Systems Engineering Branch. We have informed ONP upper management that we

believe their action is contrary to the best interest of TVA and is an attempt to intimidate and harass us. We request your investigation of this matter. (Joint Exhibit ALJ-1).

The Plaintiff alleges (among other things) that the dissolution of the Systems Engineering Branch had the specific effect of reducing his level of reporting from Lead Engineer to that of a Principal Engineer who reported to a Lead Engineer. That allegation alone, if proven, would clearly represent an adverse personnel action with respect to the Plaintiff's compensation, terms, conditions, or privileges of employment within the meaning of the ERA.

In view of the close proximity in time of the October 21, 1987, letter and the December 11, 1987, reorganization, I find that a natural inference is raised that the protected activity was the likely reason for the reorganization. Thus, taking the facts in the light most favorable to the Plaintiff, I find that he has established a prima facie case of retaliatory action.

Thus, the burden of production of evidence has shifted to the Respondent, TVA, to articulate a legitimate nondiscriminatory reason for its' decision to reorganize the Systems Engineering Branch.

Mr. Richard Sessoms, Engineering Representative for the Restart Task Force at Browns Ferry (Tr. 696) testified that at the time of the December 11, 1967, reorganization he was an Engineering Oversight Advisor to Mr. Cantrell and Engineering

[Page 10]

Manager with the responsibilities for the Division of Engineering's Operation and Engineering Services Organization, sometimes referred to as Corporate OES as opposed to OES at Browns Ferry (Tr. 697). Sessoms testified that it became his responsibility to execute the dissolution of Corporate OES, and transfer of the Systems Engineering Branch functions and personnel to the Nuclear Technology Branch; and that the decision to so reorganize was made in part upon his recommendation (Tr. 769).

Mr. Sessoms testified that he wrote the December 11, 1987, Memorandum in Defendant's Exhibit 9 which effected the reorganization and transfer of OES functions and resources to the Division of Nuclear Engineering (Tr. 770). The Memorandum was actually issued and signed by J.A. Kirkebo, Director of Nuclear Engineering, TVA.

Sessoms testified that his intent in the reorganization was,

The intent was to put those resources within an organization that would closely align, eliminate interfaces and streamline that organization in fitting them back into established organizations within the Division of Nuclear Engineering. And after looking at where those organizations would fit best, the elimination of as

many interfaces as possible, I made a recommendation to the Division Director that they be incorporated with the Division of Nuclear Technology. In a similar vein, many of the other organizations were- parts of their organization were fit into existing branches and other pieces of the organization were directed into new branches and branches outside the Division of Engineering. Many of the resources were transferred to the sites, but in general each and every one of the organizations and individuals within that organization were addressed to see where the best fit and supervision and integration of their functions could be accomplished. (Tr. 771).

[Page 11]

He further stated that the intent with respect to SEB (of which Ray was a part), was to keep it together basically as it had existed and attach it to the Nuclear Technology Branch. However, that was not true with respect to the other branches of ACC me they were split into various pieces. (Tr. 772).

Upon consideration of the evidence, it is my judgment that the Respondent has articulated a legitimate nondiscriminatory reason for the December 11, 1987, reorganization of SEB. Thus, I find that the inference of retaliation, set out above, has been rebutted by TVA. The Plaintiff, therefore, in order to prevail, bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons articulated by TVA for the reorganization were a mere pretext for discrimination.

The Plaintiff's case to establish that the reorganization of SEB was a pretext for retaliating against his activities involving the PRA, is entirely circumstantial. As indicated, Ray testified that he was advised by Mr. Speidel and Mr. Chapman that he should disassociate himself from the PRA and Dr. Lau and Mr. Christie.

Ray also testified that he was in his (Ray's) office on November 3, 1987, having a discussion with Kara Morgan, a nuclear engineer who worked for him, when Mr. Speidel came in to his office. He stated that Speidel came in and pointed to the September 1987 PRA that had just been published. Ray indicated that he had gone to Speidel several weeks before to make sure that he knew that it had been published because it was an open item with resident NRC inspector to get it revised and to get it under document control. Ray indicated that Speidel had earlier been pleased, but that when he came in on this occasion, Speidel was "visibly upset, words to the effect that there would be disciplinary action in regard to the publishing the September-who authorized the publishing of that. He knew I was working on it.

[Page 12]

I'm not sure who changed his mind." In a subsequent response, Ray indicated he was referring to the September PRA (Tr. 340).

Mr. Ray testified that during November 1987 he had been conducting training sessions on the PRA for engineers and managers as Browns Ferry, and that he had been doing so under the direction of the Project Engineer for a period of a year and a half. In response to the question "Did that at some point come to an end?" (Tr. 341 line 10), Ray answered.

Yes, in that same time frame, word was passed back to me after I had sent another memo out regarding training on another PRA class, that Mr. Speidel says that we're out of control or to stop doing this, to turn it over to Dave Burrell, Engineering Assurance, which I did.

Ray testified that during September through December 1987, there were events which occurred with respect to the NRC. He indicated that he was a part of meetings under the Work Smart Program begun by Dr. Lau. (Tr. 341). He stated that it was his understanding that the resident NRC inspector had complete freedom of the project and freedom to walk in at any place, any location on the job. Ray testified that two resident inspectors had asked him during the summer to place them on the distribution notices for the meetings, which was not uncommon. Ray indicated that he advised "my management" of their (NRC inspectors) request, which they acknowledged and said to continue. (Tr. 342). Mr. Ray then stated that the NRC was no longer included with copies of what he was doing at the end of December of '87 (Tr. 343 line 21, 22, 23, 24). Ray said this was stopped because he had a note from the Licensing Manager to stop it; and that he had a conversation in Speidel's office in which the Manager of Licensing, Mike May, "told me to drop them off the distribution."

[Page 13]

(Tr. 344 line 6). Ray indicated that he responded that he had a couple more meetings to send out and that he was going to go ahead and comply with the resident inspectors request, which he did. (Tr. 344).

Ray also testified that he received a note from one of the engineers under his supervision, Ken Ostrom, relating to copying notices to the NRC resident inspectors. (Tr. 371). The record contains a memo from Mr. Ostrom to Morgan Ray dated March 8, 1988, in which Mr. Ostrom indicates that,

On or about October 7, 1987 I received a telephone call from Joe Savage, BRN Licensing. I was asked to remove the NRC Resident Inspector from distribution of correspondence concerning the "System Startup Meetings". The resident inspector had been copied on all meeting memos up to this point so I requested that Joe send me the directive removing him. There was no official directive stating this, which was confirmed in a memo (lined out in original) 45 (placed over the word memo in original) from Joe about a week later. I continued to copy the inspector. This was done because 1) The inspector confirmed that he would like to continue to receive the correspondence, and 2) It would be contrary to my own division directive not to maintain professional

contact with the NRC. M. J. May was copied every document the inspector received, and I feel it was and still is important to maintain a working relationship with the NRC. (PX 35).

Ray testified as to a memo which he received, and which is admitted into the record as Plaintiff's Exhibit 36. He stated that the memo contains a distribution sheet with a handwritten note "from JAK, who is John Kirkebo, head of Design," to

[Page 14]

Doug, who is under, "get receipt, acknowledgment of this memo and their intent to comply from everyone in NTB." Ray stated that "this was only to our branch, it did not apply to anybody else." He also indicated that two of the engineers working for him refused to sign the memo, and that he refused also and sent it back to Bob Christie in Knoxville and took a copy to the Nuclear Regulatory Commission resident inspector at that time. (Tr. 374, 375).

Ray testified that he attended a January 28 1987, Nuclear Safety Review Board (an internal TVA organization) meeting that occurred at Browns Ferry, and that his role at the meeting was to offer technical support on the use of the PRA and to advise Dr. Lau and to answer questions regarding the Work Smart Program (PRA related). (TR. 376, 377). The minutes of that NSRB meeting are contained in PX 13.

Ray testified that after the Department of Labor investigation in February of 1988 he had a conversation with Speidel, and Ray stated (Tr. 351 line 2),

I asked him about--well we talked about the conversation with DOL and, you know, I hoped things hadn't gotten personal with him and I don't think it had at that time. And that-I asked him about the comments about disassociating myself with my supervisor and the PRA in the best interest of my career, and he told me that he told the DOL investigator that if I took that position I would have to quote take the hits.

It is not disputed that the completion of the PRA is not mandatory for TVA, and that management has the right to determine whether and to what extent to use the PRA. (Tr. 160-161, Dr. Lau). The only apparent limitation placed upon TVA was by the NRC, (see, Bernero letter described above, PX 12) which indicated that ". . . it cannot be ignored. TVA must endorse it,

[Page 15]

amend it, or rebut it." However, it is clear that Dr. Lau, Mr. Christie and Morgan Ray disagreed with any suggestion that TVA should minimize or discontinue the use of PRA. Indeed, it seems clear that all the nine managers who signed the expression of staff views

(PX 9) believed that any decision to minimize the use of the PRA was a significant safety concern to them. Nevertheless, TVA is allowed the management decision to determine whether to ignore, amend or rebut the PRA.

I have found that the expression of disagreement (even internally within TVA), by Morgan Ray, Dr. Lau and others, with TVA's management decisions relating to PRA is a protected activity. However, the present issue is whether the Plaintiff has established by a preponderance of the evidence that the dissolution of OES and reorganization of the Systems Engineering Branch was a mere pretext for retaliation against Morgan Ray, and others, for their disagreement with management's view of PRA.

Upon consideration of all of the evidence, I find that the Plaintiff has not established by a preponderance of the evidence that the December 11, 1987, reorganization was motivated by an intent to retaliate against Morgan Ray for his protected activities.

Mr. Ray has also presented evidence of other actions by TVA which he believes are discriminatory against him, such as failure to approve his grade as that of an M6, removal from a private office to the bull pen area, and harassment for his views on PRA. However, all of these actions occurred outside of the 30 day period immediately preceding the filing of his complaint. Thus, I find that these other alleged acts of discrimination could not be considered unless the reorganization of SEB were found to be actionable.

In conclusion, since the Plaintiff has not established that the December 11, 1987, reorganization of SEB was improperly motivated, it is Recommended that the complaint of Morgan G. Ray should be Dismissed.

Richard E. Huddleston
Administrative Law Judge

[ENDNOTES]

¹ The following abbreviations are used in this decision: ALJ exhibits received by the Administrative Law judge prior to the formal hearing marked by the parties as joint exhibits; DX-Respondents exhibits; PX-Plaintiff's exhibits; Tr.- Transcript of hearing.